

SJC-12509

COMMONWEALTH OF MASSACHUSETTS
MASSACHUSETTS APPEALS COURT

APPEALS COURT
DOCKET NO.: 2017-P-0809

CINDY KING
Plaintiff-Appellee

v.

KATHLEEN SPOFFORD et. al.
Defendant-Appellants

ON APPEAL FROM AN ORDER
OF A SINGLE JUSTICE OF THE APPEALS COURT

BRIEF OF DEFENDANT-APPELLANTS, THE CITIZEN-DEFENDANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	2
STATEMENT OF ISSUES PRESENTED	4
STATEMENT OF THE CASE	5
STATEMENT OF FACTS	7
I. The Recall Act and the Procedures Followed by the Citizen-Defendants in Seeking to Recall Ms. King....	7
II.Lower Court Proceedings.....	10
ARGUMENT	12
I. Standard of Review.....	12
II.Because the Order Issued by the Single Justice is Based upon an Erroneous Interpretation of the Recall Act, it is Incorrect as a Matter of Law.....	13
III. Since the Order of the Single Justice Weighed the Merits of the Recall and Impermissibly Interfered with the Rights of the Town Electorate, it is Inconsistent with <i>Donahue</i> and <i>Mieczkowski</i> , and Erroneous as a Matter of Law.....	18
IV.The Balance of Harm Strongly Favors the Citizen- Defendants, and the Town Voters.....	23
CONCLUSION	27
CERTIFICATE OF SERVICE	47

TABLE OF AUTHORITIES

Cases

<i>Attorney Gen. v. School Comm. of Essex,</i> 387 Mass. 326 (1982).....	16
<i>Attorney General v. Town Clerk of Hudson,</i> 408 Mass. 1006 (1990)	25
<i>Bank of New England, N.A. v. Mortgage</i> <i>Corp. of New England,</i> 30 Mass. App. Ct. 238 (1991)	25
<i>Boston Medical Center Corp. v. Secretary of the</i> <i>Executive Office of Health and Human Services,</i> 463 Mass. 447 (2012)	22
<i>Commonwealth v. Fremont Inc. & Loan,</i> 452 Mass. 733 (2008).....	12
<i>Donahue v. Selectman of Saugus,</i> 343 Mass. 93 (1961).....	<i>passim</i>
<i>Eaton v. Fannie Mae,</i> 462 Mass. 569 (2012).....	13
<i>Marino v. Southbridge,</i> 2001 Mass. Super. LEXIS 85 (2001).....	26
<i>Massachusetts Redemption Coalition, Inc.</i> <i>v. Secretary of the Executive Office of Env'tl.</i> <i>Affairs,</i> 68 Mass. App. Ct. 67 (2007).....	22
<i>Mieczkowski v. Bd. of Registrars of Hadley,</i> 53 Mass. App. Ct. 62 (2001).....	<i>passim</i>
<i>Morra v. Strange,</i> 2007 Mass. Super. LEXIS 479(2007).....	26
<i>Nixon v. United States,</i> 506 U.S. 224(1992).....	22
<i>Packaging Indus. Group, Inc. v. Cheney,</i> 380 Mass. 609(1980).....	12, 13

Perlera v. Vining Disposal Service, Inc.,
47 Mass.App.Ct. 491 (1999)..... 16

Santana v. Registrars of Voters of Worcester,
384 Mass. 487 (1981)..... 22

Seller's Case,
452 Mass. 804(2008)..... 16

Statutes

Recall Act, St. 1995, c. 27..... *passim*

STATEMENT OF ISSUES PRESENTED

- I. Whether the Single Justice of the Appeals Court (Green J.) erred in entering an Order on June 2, 2017, enjoining the recall election scheduled for Plaintiff-Appellee, Cindy King pursuant to the Recall Act for the Town of Townsend, St. 1995, c. 27. Additionally, the sub-issues presented are:
 - a. Whether the reasons set forth in the Recall Affidavit submitted for the recall of Ms. King comply with the requirements of the Recall Act for the Town of Townsend.
 - b. Whether the Order of the Single Justice, enjoining the recall election of Ms. King, is contrary to the purpose of a recall election as set forth in *Donahue v. Selectman of Saugus*, 343 Mass. 93 (1961) and *Mieczkowski v. Bd. of Registrars of Hadley*, 53 Mass. App. Ct. 62 (2001).

STATEMENT OF THE CASE

Defendant-Appellants Joseph Z. Shank, Elaine R. Shank, Leanne Jackson, Erica L. Art, Kelly Michele Kelly, Michael P. Kelly, Lisa Lewand, Stacy C. Sheldon, Stephen J. Sheldon, and Jennifer Ann McLaughlin ("Citizen-Defendants") bring this appeal, to secure their right to a recall election for an elected-member of the Board of Selectmen for the Town of Townsend ("Town"), pursuant to the Town's Recall Act, St. 1995, c. 27. On February 24, 2017, the Citizen-Defendants commenced the recall effort and subsequently satisfied all procedural requisites to secure a recall election for Plaintiff-Appellee, Cindy King ("Ms. King"). Pursuant to the Recall Act, the Board of Selectmen scheduled the recall election to be held on June 19, 2017. See R.A. 6. However, a mere two weeks before the scheduled election, the Town electorate was preemptively silenced by an Order of the Single Justice, and, to date, no election has been held. See R.A. 105.

I. The Action Brought by Ms. King.

Following the scheduling of the recall election, on March 27, 2017, Ms. King filed an action in

Middlesex Superior Court arguing that the grounds “contained in the Recall Affidavit [did] not conform to the type of conduct contemplated by the Recall Act,” and thus sought to enjoin the scheduled recall election. See R.A. 6. In her action, Ms. King named the Town Clerk, members of the Town Board of Registrars, and ten private citizens in the Town who helped organize the recall election, the Citizen-Defendants. *Id.*

After hearing, on April 19, 2017, the Middlesex Superior Court (Lu, J.) denied Ms. King’s motion for a preliminary injunction finding that ““at [a] minimum, the [Recall Affidavit] plainly states the grounds for the recall-misfeasance and neglect of duty—and therefore complies with the requirements of the Recall Act.” See R.A. 58.

Ms. King subsequently filed a Petition pursuant to G.L. c. 231, Section 118, first paragraph, to the Single Justice of the Appeals Court on May 15, 2017. See R.A. 65. After soliciting written oppositions, a hearing was held on June 1, 2017. By Order dated June 2, 2017, the Single Justice (Green, J.), reversed the decision of the Superior Court and entered an Order

enjoining the Town from holding the recall election of Ms. King on June 19, 2017. See R.A. 105.

Following the Order of the Single Justice, the Citizen-Defendants duly filed a Notice of Appeal, and this appeal follows.¹ See R.A. 123.

STATEMENT OF FACTS

I. The Recall Act and the Procedures Followed by the Citizen-Defendants in Seeking to Recall Ms. King

Recall elections in Townsend are governed by the Recall Act, St. 1995, c. 27, which provides that “any person who holds an elected office in the Town of Townsend... may be recalled from office by the registered voters of said Town,” See *Recall Act*, § 1. In order to hold a recall election, the Recall Act sets forth certain procedural requirements that must first be followed. As an elected official in the Town, Ms. King does not dispute the applicability of the

¹In filing their Notice of Appeal, the Citizen-Defendants simultaneously filed with the Appeals Court, a Motion to Stay Pending Appeal and a Motion for Reconsideration, in order to allow the recall election to proceed as scheduled during the pendency of this appeal. On June 7, 2017, the Appeals Court (Green, J.) denied both of the Citizen-Defendants’ motions. See R.A. 112 and 125. In addition, the Citizen-Defendants, pursuant to G.L. c. 211, § 3, filed a petition for relief with a Single Justice of the Supreme Judicial Court on June 8, 2017. See R.A. 149. After hearing, on June 14, 2017, the Single Justice of the Supreme Judicial Court (Cypher, J.) denied the Citizen-Defendant’s petition.

Recall Act, or that the Citizen-Defendants complied with the Recall Act's required procedures in initiating her recall. See Record Appendix (R.A.) 6.

In accordance with the Recall Act, residents of the Town organized and submitted² a Recall Affidavit seeking to initiate a recall of Ms. King (the "Recall Affidavit"). On February 24, 2017, "at least 400 registered voters or 10% [of Town voters]" "file[d] with the Town Clerk... an affidavit containing the name of the officer whose recall [was] sought and a statement of the grounds upon which the petition [was] based³." See *Recall Act* § 2; see R.A. 55.

As required by the Recall Act, the Recall Affidavit set forth four separate and specific grounds

² The securing of the signatures was no small achievement. According to the 2010 Census, the population of Townsend was 8,926, while, according to the Town's Annual Report for 2015, the number of registered voters in the Town was 6,172. The required number of signatures were secured in a Town without large gathering areas, such as shopping centers, where petition signatures are ordinarily secured.

³ The Recall Act provides that "lack of fitness," "corruption," "neglect of duties," and "misfeasance" constitute grounds for recall; in addition, the Recall Act provides examples following each of the stated grounds. However, the Recall Act provides that "the exercise of discretion in voting on matters before the officer [shall not] constitute grounds for recall," See *Recall Act* § 2

upon which Ms. King's recall was based. Specifically, the Recall Affidavit provided that:

- "Whereas, Cindy King has neglected her duty to adequately represent the people of Townsend by refusing to argue in the affirmative for the public to be allowed a time for public communication at Board of Selectman meetings when no other board before this has refused to hear public comments or concerns and;"
- "Whereas, Cindy King has impeded our Police Chief's ability to do the job he was hired to do by using her position of authority and by imposing her views on day-to-day management of the Police Department and;"
- "Whereas, Cindy King neglected to support prior agreements made by the town with our Police Lieutenant and;"
- "Whereas, Cindy King neglected to speak for obtaining an official and full background check on an applicant for a senior position with the Town of Townsend prior to signing the employment contract..."

See R.A. 10.

Upon receipt of the Recall Affidavit, on March 6, 2017, the Town Clerk "deliver[ed] to said voters petition blanks demanding," the recall of Ms. King. *Recall Act* § 2; see R.A. 55. Indeed, Town Counsel altered the language of the petitions so as to eliminate doubt as to the validity of the recall effort. R.A. 115. As required by the Recall Act, the blank recall petitions were then completed by at least

ten percent of the Town's registered voters, and returned to the Town Clerk, within the twenty-one day deadline set forth under the Recall Act, on March 13, 2017. *Recall Act* § 2; see R.A. 55.

Following the submission of the completed recall petitions, "the Town Clerk submit[ted] said petitions to the registrar of voters," and the Registrar certified the number and authenticity of the petitions on March 21, 2017, concluding that the Recall Act's ten percent threshold of total voters was, indeed, met. *Recall Act* § 2; see R.A. 55. After the petitions were deemed "sufficient," the Town Clerk then submitted the certified petitions to the Board of Selectmen on March 21, 2017, so that the Board of Selectmen could schedule the recall election for Ms. King. *Id.* § 3; see R.A. 55.

In turn, the recall election for Ms. King was scheduled by the Board of Selectmen to be held on June 19, 2017.

II. Lower Court Proceedings.

As referenced above, following the scheduling of the recall election, Ms. King first filed an action in Middlesex Superior Court arguing that the grounds

"contained in the Recall Affidavit [did] not conform to the type of conduct contemplated by the Recall Act," and thus sought preemptively to void her recall election.⁴ See R.A. 60.

On April 19, 2017, the Middlesex Superior Court (Lu, J.) denied Ms. King's motion for a preliminary injunction finding that "at [a] minimum, the [Recall Affidavit] plainly states the grounds for the recall-misfeasance and neglect of duty-and therefore complies with the requirements of the Recall Act." See R.A. 60. The Court reasoned that "it is not the court's role to determine whether the conduct alleged in the [Recall Affidavit] in fact amounts to neglect of duty or misfeasance," See R.A. 60. Instead, that question is best left to the Town electorate. Because the Town's citizens complied with the procedural requirements of the Recall Act, the Court found that "Ms. King was unlikely to succeed on the merits of her claim that the recall election must be enjoined due to deficiencies in the affidavit." See R.A. 63.

⁴Ms. King brought this challenge even though Town Counsel had previously opined that the Petition was in proper form and appropriate under the Recall Act. In fact, Town Counsel made some changes in the language to eliminate, according to Town Counsel, all doubts as to the legality of the Petition. See R.A. 115.

On May 15, 2017, a few days before the statutory deadline, Ms. King filed a Petition pursuant to G.L.c. 231, Section 118, first paragraph, to the Single Justice of the Appeals Court. See R.A. 65. By Order dated June 2, 2017, the Single Justice (Green, J.), reversed the decision of the Superior Court and entered an Order directing the Town to halt the recall election for Ms. King, scheduled for June 19, 2017. To date, no election has been held. See R.A. 105.

ARGUMENT

I. Standard of Review.

The court “review[s] the grant or denial of a preliminary injunction for abuse of discretion,” See *Commonwealth v. Fremont Inc. & Loan*, 452 Mass. 733, 741 (2008). While the “standard of review is...framed in terms of abuse of discretion,” the Court is not intended “to be mere rubber-stamps save for the rare cases when [a lower court] has misunderstood the law or transcended the bounds of reason,” See *Packaging Indus. Group, Inc. v. Cheney*, 380 Mass. 609, 615 (1980). Rather, the Court “must look to the same factors properly considered by [the lower court] in the first instance,” and conclusions of laws are “subject to broad review and will be reversed if

incorrect.” *Id.*; *Eaton v. Fannie Mae*, 462 Mass. 569, 574 (2012).

In turn, in evaluating the Plaintiff-Appellee’s request for a preliminary injunction, the Single Justice, and the Superior Court, were required to evaluate, in combination, the merits of Plaintiff-Appellee’s claim, and the potential injury on each party resulting from the issuance, or denial, of the requested injunction. See *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980).

II. Because the Order Issued by the Single Justice is Based upon an Erroneous Interpretation of the Recall Act, it is Incorrect as a Matter of Law.

The decision of the Single Justice maintained that the “grounds” contained in the Recall Affidavit were substantively insufficient to warrant a recall under the Recall Act; in more basic terms, the Single Justice did not believe that the reasons set forth in the Recall Affidavit were “good” reasons to recall Ms. King. This contention not only supplants the will of the Town’s electorate in determining whether or now Ms. King should continue to serve, but, notably, has twice been previously considered, and rejected. See

Donahue v. Selectmen of Saugus, 343 Mass. 93, 95 (1961) (denying an injunction where “the respondent board argues that the ‘statement of the grounds for recall’ is not sufficient”); *Mieczkowski v. Board of Registrars of Hadley*, 53 Mass. App. Ct. 62, 63 (2001) (denying injunction where “[the plaintiff] sought a preliminary injunction on the basis that the grounds for his recall were not sufficiently explicit”).

The only way for the Single Justice to escape the mandates of *Donahue* and *Mieczkowski* was to conclude that, because the Recall Act contained examples of the type of conduct warranting a recall, that these cases were distinguishable. This interpretation of the Recall Act is both exceedingly narrow, and an error of law. Although the Single Justice purported to eschew the dispute between the parties as to the correct interpretation of the examples contained in the Recall Act,⁵ the Single Justice effectively concluded that the

⁵The Single Justice stated, “while the parties disagree sharply on whether those elaborations constitute definitions of each term or merely illustrative examples, I need not resolve the precise character of the explanatory language; it is enough to observe that the explanations following each of the specified grounds furnish at least a general guidance concerning how each should be understood, and the conduct or circumstances that each encompasses.” However, the Single Justice proceeded to conclude that the recall affidavits were deficient because they did not

examples in the Recall Act were exclusive, and could serve as the only basis for a proper recall. See R.A. 109-110, ("Taking the allegations of the petition as true. . . they do not describe "neglect of duty" in any manner resembling that term as described in the Recall Act."). This assertion is erroneous as a matter of law.

The decision of the Single Justice can only be based upon the conclusion that "neglect of duties" under the Recall Act can only mean "repeated absences from meetings without just cause," and *that no other conduct* could warrant a recall for "neglect of duties." As a matter of common sense, there are infinite examples of conduct that could warrant a recall based upon "neglect of duties," which cannot be encapsulated in a laundry-type list; as such, the example provided in the Recall Act is not, and cannot be, the *only* conduct that justifies a recall. Such an

"describe 'neglect of duty' in any manner resembling that term as described in the Recall Act." The Single Justice could only reach this conclusion if he believed that the specific example of "Neglect of Duty" given in the Recall Act was exclusive, as opposed to a mere illustrative example of conduct that could warrant a recall under this provision.

interpretation would be nonsensical and absurd.⁶ See *Attorney Gen. v. School Comm. of Essex*, 387 Mass. 326, 336 (1982) (stating that “we will not adopt a literal construction of a statute if the consequences of such construction are absurd or unreasonable,”). Neither would the maxim of statutory construction, *expressio unius est exclusio alterius* support the Single Justice’s interpretation. See *Seller’s Case*, 452 Mass. 804, 813 (2008). To apply this maxim would render the general terms in the Recall Act superfluous, a result to be avoided. *Perlera v. Vining Disposal Service, Inc.*, 47 Mass.App.Ct. 491, 496 (1999). In fact, if “neglect of duty” could only mean repeated absences without excuse, as the Single Justice concluded, there would be no reason to include the term “neglect of duty” in the Recall Act at all. Instead, the Recall Act’s drafters could have simply listed “repeated absences without just cause” as a ground for recall directly, rather than go through the drafting gymnastics of providing a single, and exclusive, example to the

⁶To illustrate the absurdity of this interpretation, if the citizens were faced with a member of the Board of Selectmen who continually fell asleep during meetings, the Single Justice would not approve of a recall on this basis, since the member was present at the meetings and “falling asleep” is not one of the examples explicitly set forth in the Recall Act.

broader term "neglect of duties" as the Single Justice concluded.

In this instance, the Recall Affidavit set forth four separate grounds for Ms. King's recall, citing instances where she had "neglected her duty," as an elected official. *Recall Act* § 2 (providing for "neglect of duties," as grounds for recall); See *Donahue v. Selectman of Saugus*, 343 Mass. 93, 95 (1961) (finding grounds stated "upon the face of the affidavit...sufficient"). While the Plaintiff-Appellee, may argue for an exceedingly narrow construction of the Recall Act, in order to isolate her from accountability to the electorate, such a construction is both irrational as a matter of statutory interpretation and suppresses the effectiveness of the Recall Act. Instead, the most reasonable interpretation of the Recall Act is the one adopted by the Trial Court (Lu J.): that the examples in the Recall Act are just that; exemplars of certain conduct that could warrant a recall, which serves to inform *Town residents* of other conduct that, although not explicitly set forth, could also warrant a recall. An interpretation, and standard, plainly met by the

Recall Affidavit for Ms. King which set forth four separate grounds for recall which amounted to a "neglect of duties."

III. Since the Order of the Single Justice Weighed the Merits of the Recall and Impermissibly Interfered with the Rights of the Town Electorate, it is Inconsistent with Donahue and Mieczkowski, and Erroneous as a Matter of Law.

Notwithstanding the decision of the Single Justice, the purpose of the Recall Affidavit, and its stated grounds, is not to create a path to litigate, in court, the merits of the grounds for recall. See *Mieczkowski*, 53 Mass. App. Ct. 62, 64 (2001) ("we do not think the purpose of the affidavit is to give notice to the one who is the object of the recall of every factual basis therefor or to afford that person an opportunity to respond,"). Instead "the function of the affidavit . . . is to start in motion the recall procedure," See *Donahue*, 343 Mass. 93, 96 (1961); *Mieczkowski*, 53 Mass. App. Ct. 62, 64 (2001) (holding that affidavit's grounds requirement "is more for the benefit of providing notice of the general reasons for the recall to the voters, not the elected official").

In short, the allegations set forth on the face of the Recall Affidavit plainly provided sufficient information to the Town's citizens concerning Ms. King's conduct in order to commence the recall process; the Recall Act requires nothing more. See *Donahue*, 343 Mass. 93, 95 (1961) (finding grounds stated "upon the face of the affidavit... sufficient,"); *Mieczkowski*, 53 Mass. App. Ct. 62, 64 (2001) ("we are hard pressed to conclude that the voters were required to do more when they expressly stated 'reasons' set forth in the statute. The requisite statement of grounds was adopted by the requisite number of voters who approved the recall by signing the petitions,"). As the Superior Court (Lu J.) correctly recognized, should Ms. King wish to contest the merits of the Recall Affidavit's grounds, the appropriate avenue is not injunctive relief, but through the electoral process and the ballot-box. See R.A. 62 ("it is not the court's role to determine whether the conduct alleged in the [Recall Affidavit] in fact amounts to neglect of duty or misfeasance"). Such a determination should not have been disturbed by the Single Justice.

In her action, Ms. King improperly urged the court, to "look behind the statement of grounds,"

contained in the Recall Affidavit and declare the grounds insufficient to warrant a recall. See *Donahue*, 343 Mass. 93, 95 (1961). What Ms. King really sought was a judicial determination in lieu of a public vote. The decision of the Single Justice granting this request, ignores the decisions in both *Donahue* and *Mieczkowski*, is contrary to the underlying process of a recall election and is an error of law.⁷

⁷ The Single Justice reasoned that the language in the Recall Act provides "general guidance" as to what type of conduct warrants a recall under the Recall Act. In direct contradiction to *Donahue* and *Mieczkowski*, the Single Justice erroneously contended that this "guidance" was to the Courts, not the voters. The Single Justice's decision to "look behind the statement of grounds," and interfere with the electoral process, raises numerous critical procedural and practical concerns not contemplated by the Recall Act. For example, should the citizens of the Town wish to recall their elected official on the grounds that the official routinely falls asleep during important Town meetings: 1) could the elected official bring suit challenging the factual assertion that he or she was falling asleep; 2) are the citizens then required to prove, in court, that the elected official actually has fallen asleep; 3) in evaluating the sufficiency of the elected official's complaint, are the factual assertions taken as true, or are the facts alleged in the recall affidavit controlling; 4) is the determination as to whether repeatedly falling asleep warrants a recall, a factual question for the jury, or a question of law; 5) how many times must an elected official fall asleep before a recall is warranted, and who determines that answer; 6) must the citizens prove that the elected official's repeated falling asleep amounts to an "absence" under the Recall Act, or has otherwise negatively impacted the Town; 7) how will the elected official's claim be determined within the ninety day timeline to hold the recall election mandated by the Recall Act; 8) will the threat of litigation by the elected official have a chilling effect on citizens of the Town who now must not only comply with

Recall elections are designed to be “prompt;” “not a prolonged period while the official under siege mounts a defense,” *See Mieczkowski*, 53 Mass. App. Ct. 62, 64-64 (2001); *Donahue*, 343 Mass. 93, 95 (1961) (“that the courts should conduct a hearing and go behind the statement [in the Recall Affidavit] is not contemplated by [the statute]”); *Recall Act* §§ 2 and 3 (detailing short time constraints). The purpose of the Recall Affidavit is to provide Town voters with information to determine if a recall election is appropriate and whether the official should continue to serve in elected office; a purpose plainly met here. Notwithstanding the fact that the grounds in the Recall Affidavit were accepted by the requisite number of Town residents, the Single Justice erroneously concluded that a court should decide whether the “grounds” truly justify Ms. King’s recall. But neither

the Recall Act’s procedures, but also fund and defend their grounds for recall in prolonged litigation; 9) before issuing the recall petition, should the Town Clerk first conduct an evaluation of the grounds in the recall affidavit to determine if falling asleep in meetings warrants a recall, and what criteria should they use. The Recall Act contemplates none of these questions. In reality, the decision whether or not certain conduct warrants a recall under the Recall Act, is a decision exclusively left to the Town voters; should the elected official wish to contest the merits, or factual basis, of the recall, the appropriate forum is not the judiciary, but in the court of public opinion.

Ms. King, nor the courts, are best-suited to determine if the "grounds" contained in the Recall Affidavit are sufficient to warrant a recall; instead, that decision is a political question, best left to the Town's voters.⁸ See *Santana v. Registrars of Voters of Worcester*, 384 Mass. 487, 491 (1981) ("the object of elections is to ascertain the popular will and not to thwart it,").

⁸ Both Massachusetts and Federal Courts have recognized that in certain claims, "the lack of finality and the difficulty of fashioning relief," indicate the presence of a non-justiciable political question for which the judiciary is ill-suited to entertain. See *Nixon v. United States*, 506 U.S. 224, 236 (1992); Cf. *Boston Medical Center Corp. v. Secretary of the Executive Office of Health and Human Services*, 463 Mass. 447, 455 (2012) ("a statutory duty by itself does necessarily imply a judicial remedy to challenge the executive branch's compliance with that duty."); *Massachusetts Redemption Coalition, Inc. v. Secretary of the Executive Office of Env'tl. Affairs*, 68 Mass. App. Ct. 67, 68-70 (statute mandating that "secretary... shall promulgate... regulations" creates "purely political question... best left to the executive branch," and does not create private right to challenge compliance in court,). In such cases which involve the removal of public officials, courts have recognized that "opening the door of judicial review... would expose the political life of [a town] to months, or perhaps years, of chaos," See *Nixon*, 506 U.S., at 23 (discussing impeachment standards). Ms. King's claims present just such a case. The question of whether Ms. King should continue to serve in office is not only one best left to the voters, but a political question in which the judiciary should not be asked, or expected, to resolve.

Put simply, the Citizen-Defendants organized a well-supported, and successful, effort to initiate a recall of Ms. King. The singular purpose of the sought-after recall election was simple; to allow the Town's residents to voice their concerns regarding the job performance of their elected official, and collectively determine, in light of those concerns, whether or not Ms. King should continue to serve the Town as a member of the Board of Selectmen. Despite the Order of the Single Justice, both *Donahue* and *Mieczkowski* dictate that this decision is one that should be made at the ballot-box, not by the judiciary.

IV. The Balance of Harm Strongly Favors the Citizen-Defendants, and the Town Voters.

The Order of the Single Justice devoted one paragraph to the respective harms to be suffered by each party. This weighing of the harms constitutes an abuse of discretion.

The Recall Act provides a method by which voters in the Town may seek to recall an elected official whom they no longer wish to have serve them. See *Donahue*, 343 Mass. at 96 ("the concept is of a device to make elected officers responsive to the opinions of the

voters on particular issues"). "The implication of a recall under the statute is not of misconduct, but only that the voters prefer not to have the recalled official continue to act." *Id.* As detailed above, and as is undisputed by Ms. King, the Town's residents have performed the necessary procedural steps in order to have their voices heard on the question of whether Ms. King should continue to serve in elected office. As such, the Superior Court (Lu J.) correctly recognized that enjoining the election would preemptively silence the electorate, and undermine the purpose of the Recall act; namely the ability of the Town's citizens to determine if they "prefer not to have the recalled official continue to act," See *Donahue*, 343 Mass. at 96; see R.A. 64 ("the voters who have taken the steps necessary to satisfy the requirements of the Recall Act have the right to have the recall election take place").

While Ms. King claims that she will be harmed by the recall election, that potential harm is insufficient to justify an injunction.⁹ Instead, the

⁹ According to the records maintained by the Town Clerk, in the 2016 Annual Election in which Ms. King was elected, only 340 of the Town's 6,378 registered

Court must also weigh the potential harm to the public if the requested injunction is granted. See *Bank of New England, N.A. v. Mortgage Corp. of New England*, 30 Mass. App. Ct. 238, 246 (1991). In doing so, the Trial Court (Lu J.) explicitly found that “enjoining the recall election would be against the public interest.” See R.A. 64. As such, the Court properly considered the potential harms in this matter, concluding “the balance of harms weigh in favor of the [Town] and the citizens of Townsend.” Such consideration was correct and did not warrant the intervention of the Single Justice. See R.A. 63.

Enjoining an election before it takes place, where the procedural requirements were met, is

voters voted for a Board of Selectmen candidate, with Ms. King receiving only 259 votes. See *Clark v. Spofford et al.*, R.A. 232. Thus while the Plaintiff-Appellee claims that she will be harmed because “the voter turnout [in the recall election] will likely be far less than a general election;” that claim is simply unsupported by actual voter turnout in the Town. In reality, where only 340 votes were cast in the Annual Election which elected Ms. King, she cannot plausibly claim that she will now be harmed by low turnout in a recall election. In any event, a lower voter turnout would actually be beneficial to the Plaintiff-Appellee should the total number of votes cast fail to meet the Recall Act’s twenty-five percent threshold. See *Recall Act* § 6; See also *Attorney General v. Town Clerk of Hudson*, 408 Mass. 1006 (1990).

contrary to the public interest. Whether the citizens of Townsend wish to have an official continue to serve them is a decision exclusively left to the voters, not the Court. Instead, the decision of the Single Justice, and the claims brought by Ms. King, have placed a cloud over the Town's electorate, can only depress voter turnout and, as a result of the Recall Act's minimum vote threshold, have threatened the validity of the entire recall election. In this instance, the balance of harm weighs heavily in favor of permitting the election to go forward rather than have the Town's citizens continue to be represented by an elected official who they no longer wish to have serve. See *Morra v. Strange*, 2007 Mass. Super. LEXIS 479, 18 (2007) ("the public interest favors the right of registered voters to petition for a recall election and to secure such an election where the recall petitions satisfy [the applicable requirements],"); see also, *Marino v. Southbridge*, 2001 Mass. Super. LEXIS 85 (2001) (court's preference is for "vindicating the democratic process wherever possible,").

CONCLUSION

For the reasons set forth above, the Citizen-Defendants respectfully request that the Order of the Single Justice be vacated, so that the Town's electorate may rightfully exercise their right to vote.

Respectfully submitted,
THE CITIZEN-DEFENDANTS
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CERTIFICATE OF COMPLIANCE

This brief complies with the rules of the Court that pertain to the filing of briefs, including but not limited to: M.R.A.P. 16(a)(6) (pertinent finding or memorandum of decision); M.R.A.P. 16(e) (references to the record); M.R.A.P. 16(f) (reproduction of statutes, rules, regulations; M.R.A.P. 16(h) (length of brief); and M.R.A.P. 20 (form of briefs, appendices and other papers).

Dated: September 20, 2017

/s/ Benjamin O'Grady

ADDENDUM

Page

Statutes and Regulations

1. Chapter 27 of the Acts of 1995, entitled
An Act Providing For Recall Elections
in the Town of Townsend (the "Recall Act")..... 1

Lower Court Decisions

1. Memorandum of Decision and Order (Lu, J.)
on Plaintiff's Motion for
Preliminary Injunction
dated April 19, 2017..... 4
2. Order of the Single Justice (Green, J.)
on Petition filed pursuant to
G.L. c. 231 § 118, dated June 2, 2017..... 11

Chapter A196

SPECIAL ACTS

Chapter 27, Acts of 1995 An Act Providing for Recall Elections in the Town of Townsend

Be it enacted by the Senate and House of Representatives in General Court assembled, and by authority of the same, as follows:

1. Any person who holds an elected office in the Town of Townsend and who has held that office for four months and has more than six months remaining in the term of such office on the date of filing of the affidavit, referred to in section two, may be recalled from office by the registered voters of said Town in the manner herein provided.

2. One hundred and twenty-five or more registered voters from each precinct of the Town of Townsend for a total of at least 400 registered voters or 10% whichever is greater. As certified by the Registrar of voters as of the date of submission of petition to the Town Clerk; may file with the Town Clerk of said Town an affidavit containing the name of the officer whose recall is sought and a statement of the grounds upon which the petition is based.

Lack of Fitness (insobriety while performing official functions, involuntary commitment to a mental health facility, being placed under guardianship or conservatorship by a probate court);

Corruption (conviction of a felony involving moral turpitude, conviction of bribery, or extortion);

Neglect of Duties (repeated absences from meetings without just cause. Just cause shall include but not be limited to illness or regular vacation periods).

Misfeasance (performance of official acts in an unlawful manner, or a willful violation of the open meeting law.)

In no case shall the exercise of discretion in voting on matters before the officer constitute grounds for recall.

The Town Clerk shall deliver to the said voters petition blanks demanding said recall, printed forms of which the Clerk shall keep available. Said blanks may be completed by writing or typewriting; they shall be addressed to the Board of Selectmen; they shall contain the names of the persons who filed the affidavit and the grounds for recall as stated in the affidavit; they shall demand the election of a successor to the office; and they shall be dated and signed by the Town Clerk. A copy of the petition shall be kept on file in the office of the Town Clerk in a record book maintained for that purpose. The recall petitions shall be returned and filed in the office of the Town Clerk within twenty-one days following the date of petitions were issued, signed by at least ten percent of the total number of registered voters duly recorded on the registration list of the Town Clerk as of the preceding Town Election.

TOWNSEND CODE

The Town Clerk shall within twenty-five hours following such filing submit said petitions to the registrars of voters who shall, within seven days certify, thereon the number of signatures which are names of registered voters of the Town, and certify the total number of registered voters in the Town as of the date of filing the petition with the Town Clerk. The registrar shall determine whether a sufficient number of registered voters have signed the petition.

3. If the petition shall be certified by the registrars of voters to be sufficient, the Town Clerk shall forthwith submit the same to the Board of Selectmen. Upon its receipt of the certified petition, the board of Selectmen shall within forty-eight hours give written notice of said petition and certificate to the person or persons who recall is sought. If said officer(s) does not resign his/her office within five days following delivery of the said notice, the Board of Selectmen shall order an election to be held not less than sixty or no more than ninety days after the date of the registrars' certificate of the sufficiency of the petition. If, however, another Town election is to occur within one hundred days after the date of the certificate, the Board of Selectmen shall hold the recall election on the date of said other Town election. If a vacancy occurs in the office after a recall election has been ordered, the election shall nevertheless proceed as provided in this section, but only the ballots for candidates need be counted.

4. An officer whose recall is sought may be a candidate to succeed himself/herself at the recall election. The nomination of candidates, the publication of the Warrant for the recall election, and the conduct of the same shall all be in accordance with the provisions of laws relating to elections, unless otherwise provided in this act.

5. The incumbent shall continue to perform the duties of his office until the recall election. If he is not recalled in the election he shall continue in office for the remainder of his unexpired term, subject to recall as before, except that he cannot be recalled thereby until at least six months after the election at which his recall was submitted to the voters.

If the officer is recalled in the election, he shall be deemed removed upon the qualification of his successor who shall hold office during the unexpired term. If the successor fails to qualify within five days after receiving notification of his election, the incumbent shall thereupon be deemed removed and the office vacant.

6. Ballots used at a recall election shall contain the following propositions in the order indicated:

For the recall of (name of officer)

Against the recall of (name of officer)

Adjacent to each proposition, there shall be a place to mark a vote. After the propositions shall appear the word "candidates" followed by the names of candidates arranged alphabetically by sur name.

If a majority of the votes cast upon the question of recall is in the affirmative, and provided that at least twenty-five (25) percent of the total number of registered voters as of the date of the

SPECIAL ACTS

most recent Town election have participated in such recall election, the officer shall be deemed to have been recalled.

The ballots for candidates shall then be counted, and the candidate receiving the highest number of votes shall be declared elected. If a majority of the votes on the question is in the negative, the ballots for candidates need not be counted except as provided in section three above.

September 29, 1994

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

10

SUPERIOR COURT
CIVIL ACTION
NO. 1781CV00927

CINDY KING

vs.KATHLEEN SPOFFORD, and others¹**MEMORANDUM OF DECISION AND ORDER**
ON PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Cindy King, an elected member of the Townsend Board of Selectman (Ms. King), brings this action to enjoin the Townsend Town Clerk and the Townsend Board of Registrars (collectively "defendants") from holding a recall election to remove her from her position as a Selectman. She also asks the court to declare the Recall Affidavit and Recall Petition invalid and void of legal effect. The court concludes that it is required to allow the recall election to proceed because doing otherwise would harm the public interest. The court expresses no opinion whatsoever on how the election should turn out.

¹ Claire Devine, Mary Jane O'Hara, Catherine Thrasher, as they constitute the Town Clerk and the Members of the Townsend Board of Registrars, Joseph Z. Shank, Elane R. Shank, Leanne Jackson, Erica L. Art, Kelly Michelle Kelly, Michael P. Kelly, Lisa Lewand, Stacy C. Sheldon, Stephen J. Sheldon, and Jennifer Ann McLaughlin

DISCUSSION

A preliminary injunction is considered an extraordinary remedy and Ms. King must make a clear showing of entitlement thereto. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24 (2008); Student No. 9 v. Bd. of Educ., 440 Mass. 752, 762 (2004). A party seeking a preliminary injunction must show 1) a likelihood that they will succeed on the merits of the case, and (2) a substantial risk that they will suffer irreparable harm — *i.e.*, harm not capable of redress after final judgment — absent an injunction. Packaging Indus. Group, Inc. v. Cheney, 380 Mass. 609, 617 (1980). The court then must conclude that the risk of irreparable harm to the moving party outweighs “any similar risk of harm which granting the injunction would create for the opposing party.” Id. In cases involving a public interest, such as the present case, the court must also consider whether the relief sought will adversely affect the public interest. Tri-Nel Mgt. v. Board of Health, 433 Mass. 217, 219 (2001); Bank of New England, N.A. v. Mortgage Corp. of New England, 30 Mass. App. Ct. 238, 246 (1991). Here, Ms. King has not shown that she is likely to succeed on the merits of her challenge to the validity of the recall election. In addition, enjoining a recall election poses a significant risk of harm to the voters of Townsend. Consequently, the risk of harm to the defendants and the voters of Townsend outweighs the potential harm that the recall election poses to Ms. King.

In 1995, the Legislature approved Chapter 27, Acts of 1995, “An Act Providing for Recall Elections in the Town of Townsend” (the Recall Act). The Act provides that

“any person who holds an elected office in the Town of Townsend . . . may be recalled from office by the registered voters of said Town.” Recall Act, § 1. The Recall Act further sets forth the procedures for initiating and holding a recall election. First, “at least 400 registered voters or 10% [of registered voters] whichever is greater” file an affidavit “containing the name of the officer whose recall is sought and a statement of the grounds upon which the petition is based.” Recall Act, § 2. The Recall Act lists “lack of fitness,” “corruption,” “neglect of duties,” and “misfeasance,” as grounds for recall and provides parenthetical examples (or definitions) for each ground. The Recall Act further provides that, “in no case shall the exercise of discretion in voting on matters before the officer constitute grounds for recall.” Recall Act, § 2.

In 2015, Ms. King was elected to the Townsend Board of Selectman (“the Board”). She was reelected to the Board in 2016 and continues to serve in that capacity. Recently, residents of Townsend organized and submitted recall affidavits seeking to initiate the recall of Ms. King. After receiving the required number of recall affidavits, the Town Clerk issued recall petitions to the citizens. The town residents completed the recall petitions and returned them to the Town Clerk. The petitions were certified by the Town’s Board of Registrars. To date the Board of Selectman has not scheduled a date for the recall election.

Ms. King does not dispute that she is subject to the Recall Act or that the proper recall election procedures were followed. Instead, she asserts that the court must enjoin the defendants from scheduling or holding the recall election because the submitted

recall affidavits set forth invalid grounds for a recall. The court finds that Ms. King is unlikely to succeed on the merits of this claim.

The recall affidavit states, “we the undersigned voters of Townsend, MA, do hereby demand that a recall petition be initiated against Selectman Cindy King on the grounds of misfeasance and neglect of duty in her role as Selectman.” It then lists a number of allegations:

- Whereas, Cindy King has neglected her duty to adequately represent the people of Townsend by refusing to argue in the affirmative for the public to be allowed a time for public communication at the Board of Selectman Meetings when no other board before this has refused to hear public comments or concerns and
- Whereas, Cindy King has impeded the Townsend Police Chief’s ability to do his job he was hired to do by using her position of authority and by imposing her views on day-to-day management of the Police Department and
- Whereas, Cindy King neglected to support prior agreements made by the town with our Police Lieutenant and
- Whereas, Cindy King neglected to speak for obtaining official and full background check on an applicant for a senior position with the Town of Townsend prior to signing the employment contract

Ms. King argues the allegations contained in the affidavit do not conform to the type of conduct contemplated by the Recall Act. She points out that the Recall Act provides specific definitions for each ground category, for example: “Neglect of Duties (repeated absences from meetings without just cause. Just cause shall include but not be limited to illness or regular vacation periods);” and “Misfeasance (performance of

official acts in an unlawful manner, or a willful violation of the open meeting law).” Ms. King argues that the allegations in the affidavit do not meet these definitions. She also argues that the substance of the allegations in the affidavit involve discretionary acts she has taken as a Selectman — activities the Recall Act precludes as possible grounds for recall. The parties dispute whether the parenthetical descriptions following each ground category were intended as definitions, or mere examples. They also dispute whether any of the allegations would constitute “discretion in voting,” which the act specifically prohibits as a basis for recall.

The court finds that at minimum, the affidavit plainly states the grounds for the recall — misfeasance and neglect of duty — and therefore complies with the requirements of the Recall Act. It is not the court’s role to determine whether the conduct alleged in the affidavit in fact amounts to ‘neglect of duty’ or ‘misfeasance.’ Obviously, the court has no opinion on whether the recall effort is justified. Rather, an affidavit complies with the Recall Act so long as it sets forth “grounds upon which the petition is based.” Recall Act, § 2. In Donahue v. Selectman of Saugus, 343 Mass. 93 (1961), the Supreme Judicial Court found that a recall affidavit questioning a selectman’s performance was sufficient on its face. Id. at 95. The court concluded that the town’s recall provision did not contemplate a court conducting hearings or going “behind the statement” in the affidavit to investigate the grounds for the recall. Id. Such actions by a court would thwart the purpose of recall procedures, which is to facilitate a prompt recall election. Id. The court explained that the “function of the affidavit is not


to restrict the meaning of the unqualified word ‘grounds’ but is to start in motion the recall procedure.” Id. at 95-96. See also, Mieczkowski v. Bd. of Registrars of Hadley, 53 Mass. App. Ct. 62, 64-65 (2001) (“we do not think the purpose of the affidavit is to give notice to the one who is the object of the recall of every factual basis therefor or to afford that person the opportunity to respond . . . [w]e reject the notion that the grounds must be more specific than the reason for the recall, even if it is reasonable to assume that they may (or should be)”). In this case, as in Donahue and Mieczkowski, the “requisite statement of grounds was adopted by the requisite number of voters who approved the recall by signing the petitions.” Mieczkowski, 53 Mass. App. at 65. Ms. King is unlikely to succeed on the merits of her claim that the recall election must be enjoined due to deficiencies in the affidavit.

Given that Ms. King is unlikely to succeed on the merits of her claim, the court concludes that the balance of harms weigh in favor of the defendants and the citizens of Townsend. Although the court acknowledges Ms. King’s contention that she will suffer irreparable harm due to the stigma of a recall election, the need to campaign for a special election, and the typically lower voter turnout for a recall election (reducing her chances of success), these burdens, while legitimate, are simply characteristic of being a public official subject to recall. Absent a greater likelihood of success on the merits, the risk of harm to Ms. King does not outweigh the public interest in allowing the election to proceed. The Recall Act provides a method by which the voters in Townsend may recall officials who they no longer want to serve in an elected position. See Donahue, 343

Mass. at 96 (“The concept is of a device to make elected officers responsive to the opinions of the voters on particular issues. The implication of a recall under the statute is not of misconduct, but only that the voters prefer not to have the recalled official continue to act.”). The voters who have taken the steps necessary to satisfy the requirements of the Recall Act have the right to have the recall election take place. The court concludes that enjoining the recall election would be against the public interest.

ORDER

The plaintiff, Cindy King’s, Motion for a Preliminary Injunction is **DENIED**.



John T. Lu
Justice of the Superior Court

April 19, 2017

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

2017-J-215

CINDY KING

vs.

KATHLEEN SPOFFORD¹ & others.²

ORDER

Before me is the petition of the plaintiff, pursuant to G. L. c. 231, § 118, ¶ 1, seeking review of an order of a Superior Court judge denying her motion for a preliminary injunction to enjoin a recall election to remove the plaintiff from her position as a selectman of the town of Townsend. Upon review of the petition and materials submitted with it, including the written order entered by the Superior Court judge, and consideration of the oppositions submitted by the defendant town clerk and members of the Townsend board of registrars (together, the municipal defendants), on one hand, and the other individual defendants, on the other, and after hearing, I conclude that the requested injunctive relief is warranted.

¹ As she is the Townsend town clerk and a member of the Townsend board of registrars.

² Claire Devine, Mary Jane O'Hara, and Catherine Thrasher, as they constitute the members of the Townsend board of registrars; and Joseph Z. Shank, Elaine R. Shank, Leanne Jackson, Erica L. Art, Kelly Michele Kelly, Michael P. Kelly, Lisa Lewand, Stacy C. Sheldon, Stephen J. Sheldon, and Jennifer Ann McDonald.

A request for a preliminary injunction is addressed to the discretion of the trial court judge, and a single justice will not interfere with the exercise of that discretion in the absence of a clear error of law or abuse of discretion. See Jet-Line Services, Inc. v. Board of Selectmen of Stoughton, 25 Mass. App. Ct. 645, 646 (1988). With that standard in mind, I consider the narrow claim of legal error framed by the petition.

Pursuant to St. 1995, c. 27 (the "Recall Act"), "any person who holds an elected office in the Town of Townsend . . . may be removed from office by the registered voters of said Town." The Recall Act establishes the procedures for initiating and conducting a recall election, and for the removal of an elected official from office if the results of the recall election direct that outcome. The plaintiff raises no challenge to the authenticity, eligibility or numerosity of the signatures of registered voters on the recall petition. The plaintiff's sole challenge to the recall petition is directed to sufficiency of the grounds set forth in the petition. Judicial review of the adequacy of grounds set forth in a recall petition is exceedingly narrow. See Donahue v. Selectmen of Saugus, 343 Mass. 93, 95 (1961); Mieczkowski v. Board of Registrars of Hadley, 53 Mass. App. Ct. 62, 64-65 (2001).

The Recall Act is somewhat more restrictive than the cognate statutes involved in Donahue and Mieczkowski, *supra*. It

describes particular grounds which are to be stated in any recall petition affidavit:

"Lack of fitness, insobriety while performing official functions, involuntary commitment to a mental health facility, being placed under guardianship or conservatorship by a probate court;

Corruption, conviction of a felony involving moral turpitude, conviction of bribery, or extortion;

Neglect of duties, repeated absences from meetings without just cause, which shall include but not be limited to illness or regular vacation periods; and

Misfeasance, performance of official acts in an unlawful manner, or a willful violation of the open meeting law."

St. 1995, c. 27, § 2 (emphasis in original).

The Recall Act further provides that:

"In no case shall the exercise of discretion in voting on matters before the officer constitute grounds for recall."

Id.

In the present case, the recall petition affidavit stated that the signatories sought recall of the plaintiff on the grounds of misfeasance and neglect of duty. Continuing, it explained that:

"Whereas, Cindy King has neglected her duty to adequately represent the people of Townsend by refusing to argue in the affirmative for the public to be allowed a time for public communication at Board of Selectman meetings when no other board before this has refused to hear public comments or concerns and

Whereas, Cindy King has impeded our Police Chief's ability to do the job he was hired to do by using her position of authority and by imposing her views on day-to-day management of the Police Department and

Whereas, Cindy King neglected to support prior agreements made by the town with our Police Lieutenant and

Whereas, Cindy King neglected to speak for obtaining an official and full background check on an applicant for a senior position with the Town of Townsend prior to signing the employment contract and

Therefore, we the undersigned, consider these reasons to be an overall neglect of her duty, and have lost all confidence in Cindy King's ability to adequately represent our town as a Selectman and that she should therefore be recalled from her position on the Board of Selectmen."

As noted earlier, the Recall Act is more restrictive than those at issue in Donahue and Mieczkowski, *supra*. In Donahue, the recall statute simply required the recall petition to state the grounds for recall, without description of or limitation on the nature of permissible grounds. In its opinion, the Supreme Judicial Court rejected the contention by the respondent board of selectmen that the required statement of "grounds" should be construed to mean "'substantial grounds' involving 'some wrong or serious impropriety.'" 343 Mass. at 95. The Court offered the following additional comment: "[t]hat the courts should conduct hearings and go behind the statement is not contemplated by [the Saugus recall statute then in effect]. In Mieczkowski, the Appeals Court rejected the contention that a statement of grounds, conforming to the statute, was inadequate because it was not sufficiently explicit. See 53 Mass. App. Ct. at 63.

In the present case, the Recall Act (which we may presume the Legislature enacted with awareness of the earlier Donahue decision, see Gillette Co. v. Commissioner of Revenue, 425 Mass. 670, 677 (1997)) elaborates on the meaning of each of the grounds that may support a recall petition. While the parties disagree sharply on whether those elaborations constitute definitions of each term or merely illustrative examples, I need not resolve the precise character of the explanatory language; it is enough to observe that the explanations following each of the specified grounds furnish at least a general guidance concerning how each should be understood, and the conduct or circumstances that each encompasses.

In construing the meaning and effect of the stated grounds, I am also mindful that the Recall Act imposes an explicit limitation on use of the Recall Act itself: "[i]n no case shall the exercise of discretion in voting on matters before the officer constitute grounds for recall." Though that prohibition is cast solely by reference to voting, it reflects a concern that elected officials generally be afforded the freedom to discharge their duties as they see fit, without fear of facing recall, and that recall be reserved to those particular circumstances described in the stated grounds. In another somewhat analogous context, the Supreme Judicial Court has noted the limitation on the appropriate use of ballot initiatives:

"The people for their own protection have provided that the initiative shall not be employed with respect to certain matters. Unless the courts had power to enforce those exclusions, they would be futile, and the people could be harassed by measures of a kind that they had solemnly declared they would not consider.' We think that the question whether an initiative petition relates to an excluded matter is a justiciable question."

Carney v. Attorney General, 451 Mass. 803, 820 (2008), quoting from Bowe v. Secretary of the Commonwealth, 320 Mass. 230, 247-248 (1946).

Viewed against that backdrop, I conclude that the recall petition affidavits in the present case do not satisfy the requisites set forth in the Recall Act. Taking the allegations in the petition as true, cf. Donahue, supra at 95, they do not describe "neglect of duty" in any manner resembling that term as described in the Recall Act.³ Instead, they describe discretionary discharge of the official's duties in a manner other than as might be desired by the signatories to the petition.

As the Superior Court judge observed in his order, the plaintiff faces the prospect of irreparable harm if injunctive relief is not afforded. I also conclude that enjoining the recall election is in the public interest, as it would be both

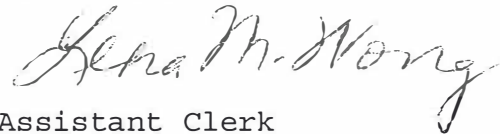
³ I note that, though the recall petition affidavit alludes to misfeasance, none of the stated allegations suggests that the described shortcoming constitutes misfeasance, nor do any of the allegations describe behavior of the sort described as misfeasance in the Recall Act.

disruptive and expensive to hold the election in circumstances where, as here, there is a substantial likelihood that the plaintiff will be successful on the merits of her claim that the recall petition does not satisfy the requirements of the Recall Act.

For the foregoing reasons, I conclude that injunctive relief is warranted. To that end, the municipal defendants, and those acting for them, are hereby enjoined until further order of this court, from holding a recall election to remove the plaintiff Cindy King from the office of Townsend Selectman, pursuant to the petition that is the subject of the plaintiff's complaint. Any action seeking to enforce this order shall be initiated in the Superior Court.⁴

So ordered.

By the Court (Green, J.)



Assistant Clerk

Entered: June 2, 2017

⁴ The plaintiff shall forthwith pay the \$90 fee provided for by G. L. c. 262, § 4.

CERTIFICATE OF SERVICE

I, Benjamin O'Grady, hereby certify that on the below date, I served a copy of the Brief of the Appellants, Citizen-Defendants, and the Record Appendix by filing and serving the above-referenced documents through the Massachusetts e-fileMA system to all Registered Users. In addition, by prior agreement of the parties, the above-referenced documents were served via email to all parties:

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